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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1222

GEORGIA WIGGINS, DONALD MARTIN COOPER, LEWIS CHERRY, ERVIN CHERRY, GOLDEN FRINKS, JAMES SPELLER, J. ALFRED CHERRY, CLIFTON JORDAN, DAVID BOND, HARVEY RANDOLPH SPELLER, JR., GEORGE L. ROUNTREE, TIM HAYES JORDAN, and NATHANIEL LEE, JR.,

Petitioners,

—v.—

STATE OF NORTH CAROLINA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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Petitioners,

—v.—

STATE OF NORTH CAROLINA.

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Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina entered in this case on December 13, 1967.

Opinion Below

The opinion of the Supreme Court of North Carolina is reported at 158 S.E.2d 37 and is set forth in the appendix, *infra*, pp. 1a-18a.

Jurisdiction

The judgment of the Supreme Court of North Carolina was entered on December 13, 1967. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), petitioners having asserted below and asserting here depriva-

tion of rights secured by the Constitution and statutes of the United States.

Question Presented

Were petitioners denied their rights under the due process clause of the Fourteenth Amendment when testimony was given at their trial against them by the sheriff of the county who had handpicked the panel from which the jury that tried and convicted them was chosen?

Statement

On September 13, 1966, petitioner Golden Frinks drove to the site of Southwestern High School with approximately 20 other persons, most of whom were students (R. 92). Southwestern High School is a Negro high school located in Bertie County, North Carolina (R. 91). The petitioners wished to demonstrate in protest of certain restrictive policies adopted by the school preventing their wearing of "freedom buttons." Upon their arrival at the high school at about 8:30 a.m., they took up signs and began peacefully picketing at the side of the road in front of the high school. The evidence did not indicate that at any time were they on school property, but rather were in a ditch that divided the highway from the school. The picketers were orderly and nonviolent at all times and did not say anything during the course of their picketing (R. 93).

The sheriff of Bertie County saw the cars with the demonstrators heading towards the high school and he followed them there. After speaking to the demonstrators, the sheriff spoke to the principal and called two deputies to come to the high school. When the deputies arrived

all 20 of the demonstrators demonstrating at that time were arrested (R. 103).

Twelve of the demonstrators were charged with violating General Statutes of North Carolina, §14-273, which makes it a misdemeanor to "wilfully interrupt or disturb any public or private school . . . either within or without the place where such . . . school is held." Petitioner, Golden Frinks, was charged with aiding and abetting the others with violating the statute (R. 10). All 13 petitioners were tried together and their convictions were affirmed in a single opinion of the North Carolina Supreme Court (158 S.E.2d 37, App. 1a).[1]

Prior to trial the petitioners challenged the composition of the jury panels in Bertie County on the grounds that Negroes had been systematically excluded therefrom. After a hearing on that issue, the trial judge agreed that such systematic exclusion had taken place (R. 31-33). However, instead of ordering a recomposition of the entire jury list and panels, he simply ordered the sheriff to pick 50 citizens known to him as persons of good character to form a new panel for the purpose of trying petitioners' case (R. 32-33). The sheriff testified that he used the telephone directory and his own memory to select names that "I knew were good, outstanding citizens of Bertie County" (R. 90). From the 50 persons, a jury of six whites and six Negroes were picked (R. 33).

At trial the sheriff was one of the three witnesses who testified for the prosecution. The other two witnesses were the principal of the high school and one of the teachers there, who, of course, were involved in the dispute with petitioners over conditions and practices at the school. Thus, the sheriff was the only wholly disinterested wit-

[1] The cases of the rest of the demonstrators were evidently handled by the local juvenile court and are not involved in the present petition.

ness that testified before the jury. His testimony was particularly important with regard to the conviction of petitioner Frinks for aiding and abetting the other defendants. The sheriff testified that, before the picketing began, he had informed Frinks that there was a statute that prohibited disturbing a public school, and that Frinks had respondent to the effect that he didn't care (R. 102, 105).

The jury returned a verdict of guilty and the defendants were fined from $10.00 to $50.00 and ordered to pay costs. Petitioner Golden Frinks was sentenced to 60 days in the county jail (R. 119-20). The convictions were appealed to the Supreme Court of North Carolina, which affirmed them on December 13, 1967. A stay of execution of the judgment was granted pending the filing and disposition of this petition.

How the Federal Question Was Raised and Decided Below

Petitioners challenged the composition of the jury, the process of its selection and the sheriff's testifying to a jury which he had selected himself. Petitioners objected to the composition of the jury by a motion to challenge the jury array (R. 31). After the court had ordered the dismissal of the original panel and ordered the sheriff to select 50 jurors himself, a further objection to this procedure was made and overruled by the trial court (R. 33, 87-90). The issue of the denial of due process under the federal Constitution because the sheriff was a key prosecution witness before a jury which he himself had selected was raised by an assignment of error on appeal (R. 135-37),[2] was argued to the Supreme Court of North Carolina, and was rejected by it (App. 13a; 158 S.E.2d at 45).

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[2] The text of the assignment of error is as follows:

This ASSIGNMENT OF ERROR is addressed, (1) to the total denial by the Trial Court of defendants' rights to be tried by a jury sys-

REASONS FOR GRANTING THE WRIT

The Decision of the North Carolina Supreme Court in Holding That It Was Not a Denial of Due Process for the Petitioners to Be Convicted by a Jury When the Sheriff Who Selected It Appeared as a Witness Conflicts With the Opinion of This Court in *Turner* v. *Louisiana*.

In the trial court below petitioners challenged the jury array on the ground that Negroes had been systematically excluded from it, in violation of the Fourteenth Amendment to the Constitution. The trial court dismissed the challenged array and rather than selecting a new panel through the jury commissioners and court clerks, ordered the sheriff to personally select 50 persons that in his opinion were of good character to be jurors.

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tem and by a jury selection process which is completely free of racial discrimination; (2) to the obviously discriminatory "cure" applied by the Trial Court to the adjudged racial discrimination in the Bertie County jury system, under which "cure" defendants are penalized in the jury selection process, solely because of their race, by being given an abbreviated, improvised and dubious jury panel of all talesmen jurors; (3) to the obviously discriminatory "cure" applied by the Trial Court to the adjudged racial discrimination by the Bertie County Commissioner in jury selection, under which "cure" defendants are further penalized solely because of their race, by the Court's leaving the selection of their panel to the subjective and uncontrolled will and discretion of an adversely interested major witness in their case, to wit, the Sheriff of Bertie County; (4) to the unconstitutional application of North Carolina General Statutes 9-11 by the Trial Court, under which application, North Carolina General Statutes 9-11 is applied as a "cure" to the adjudged unconstitutional application and administration of North Carolina General Statutes 9-1, et seq., to which the former is an inseverable adjunct. The rights above-mentioned are all protected by Article I, Sections 13, 17 and 38, of the Constitution of North Carolina and by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution. The errors above referred to are pointed up by EXCEPTIONS Nos. 8, 9, 10, 11, 12, 42 (R. pp. 87, 88, 89, 90, 120).

The trial court thus gave limited relief to petitioners' claims under the equal protection clause of the Fourteenth Amendment[3] while leaving their related due process rights to "a fair trial by a panel of impartial, 'indifferent' jurors," *Irvin* v. *Dowd*, 366 U.S. 717, 722, in the hands of the chief prosecution witness.

The sheriff testified that he selected 50 persons based on his acquaintance with them and by going through the telephone directory. Out of this handpicked group of 50 persons, 12 were selected to sit on the jury that tried and convicted petitioners. At trial the sheriff was one of three witnesses for the State. Indeed, he was the only apparently disinterested witness since the other two, the principal and a teacher at the high school, were involved in the dispute with the petitioners.

Moreover, the sheriff's testimony was of particular importance in showing intent on the part of petitioner Frinks to aid and abet in violating the statute herein involved. The sheriff stated that he had informed Frinks of the statute and Frinks had responded that he did not care that such a prohibition existed (R. 102). It must be assumed that the testimony of the sheriff had great weight in the jurors arriving at a verdict of guilty.

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[3] It is important to note that in a rural county where the population is 60% Negro (R. 32), and where the trial court found that Negroes had been systematically excluded from the jury array, that no reform of the selection system resulted. While petitioners, as defendants in a criminal action, might not have standing, as such, to seek structural reform, cf., *Mitchel* v. *Johnson*, 250 F. Supp. 117 (M.D. Ala. 1966), we contend that the resulting process of selection should be given careful scrutiny by this Court. The reasonable inference of discrimination resulting from the finding of Negro exclusion is not rectified by the kind of procedure complained of herein. For this Court to require that the procedure be reformed where it has been determined that Negroes have been systematically excluded from the juries would not only ensure a fair jury for the defendants here, but would also give some assurance that Negroes will no longer be so excluded in that jurisdiction.

However, the fact that the sheriff had picked the jurors from his personal acquaintance with them could only serve to increase his influence over them beyond that enjoyed by an ordinary witness. Thus, this case is closely analogous to *Turner* v. *Louisiana,* 379 U.S. 466. In that case the two principal witnesses for the prosecution were deputy sheriffs. The jurors were sequestered in accordance with Louisiana law during the trial and were placed in charge of the sheriff. As this Court said, "in practice, this meant that the jurors were continuously in the company of [the] deputy sheriffs," 379 U.S. at 468. This Court reversed the convictions on the ground that the right to a jury trial guarantees to the criminally accused "a fair trial by a panel of impartial, 'indifferent' jurors," 379 U.S. at 471. An impartial jury could not be assured where witnesses for the prosecution have acquired an influence over them through their official capacity.

Similarly here the jurors could not but have been influenced inordinately by the testimony of the very man who had selected them to serve as jurors. Due process demands no less than that defendants in a criminal trial, if the state chooses to try them before a jury, be put on an equal basis with the prosecution and that the jury be free of any possible bias towards the prosecution because of a close relationship between them and witnesses of the prosecution who are acting in their official capacity. Petitioners urge that certiorari should be granted to resolve the important question of whether a procedure such as adopted here can stand consistent with the rule in *Turner.*

CONCLUSION

For the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Decision of the Supreme Court of North Carolina

NORTH CAROLINA SUPREME COURT

Fall Term 1967

No. 1745 Bertie

State of North Carolina

APPENDIX

George Winston, Jr., Allen Marvin Coopers, Lewis Garnett, Davis Pinnix, Gaither James, Jarod Sessoms, J. M. Reed Carver, Clarence Jordan, Hayes Roberts, Harvey Randolph Sessoms, Jr., Clarence L. Rountree, Ira Harris Jones, Nathaniel Lee, Jr.

Appeal by defendants from Valentine, J., at the February 1967 Session of Bertie.

The defendants were tried on separate warrants, which were consolidated for trial. The warrants, as to all the defendants except Fields, charged that on or about 14 September 1966 the defendant named therein "did knowingly, wilfully and unlawfully interrupt and disturb the Southwestern High School, a public school in Bertie County, N. C., by loitering in front of the Southwestern High School, which plowing interfered with classes of the school in violation of G.S. 14-273." The warrant against Fields charged him with aiding and abetting in such interference and disturbance of the school.

Prior to pleading to the warrants, the defendants moved to quash each warrant on the ground that it shows upon its